Maurer School of Law: Indiana University
Digital Repository @ Maurer Law

Indiana Law Journal

Volume 54 | Issue 1 Article 2

Fall 1978

The "Market Necessity" Defense in Antitrust: A New Limit on the Area For Application of Per Se Rules?

Clement B. Wood
United States Court of Appeals for the Seventh Circuit

The "Market Necessity" Defense in Antitrust: A New Limit on the Area For Application of Per Se Rules?

CLEMENT B. WOOD*

Per se rules are a familiar part of the antitrust landscape today. They embrace various types of "vertical" arrangements among firms on different levels of the distribution chain as well as a number of practices engaged in by a single firm with market power. But probably the most disfavored arrangements of all--and the ones of concern here--are certain types of "horizontal" arrangements among competitors on the same level of distribution. Thus combinations or agreements by competing firms to fix prices, divide markets, or engage in group boycotts are all per se illegal. These various practices were placed within a per se illegal category only after considerable judicial experience with them had indicated that they rarely served "any purpose beyond the suppression of competition,"[1] so that there was little to be gained from exhaustive and time-consuming examination of possible justifications every time such a practice was challenged in court. Per se rules, evolving out of considerations of judicial economy, also ease the burden on the plaintiff, who need only prove that the challenged arrangement falls within a per se category. It then becomes the duty of the court to hold the arrangement illegal, without regard to possible justifications.

The simplicity which per se rules appear to bring to antitrust law is largely illusory, however, since there is considerable confusion among the courts as to what conduct falls within and what conduct falls without the scope of the various per se rules. Needless to say, the per se label should be applied only after a careful analysis of whether the challenged arrangement falls within the per se prohibited class. If there is any doubt, it is wiser to err on the side of non-inclusion, as arrangements falling outside of a per se category are still subject to scrutiny under the rule of reason.[2]

---

*J.D. Northwestern University School of Law, 1978; law clerk to Judge Latham Castle, United States Court of Appeals for the Seventh Circuit, 1978-79.

[1]Standard Oil Co. of California v. United States, 337 U.S. 293, 305-306 (1949). Referring to this passage, the court stated in a footnote in Northern Pacific Ry. Co. v. United States, 356 U.S. 1 (1958): "[S]uch nonanticompetitive purposes as these arrangements have been asserted to possess can be adequately accomplished by other means much less inimical to competition." *Id.* at 6 n.5 (citations omitted).

For a statement of the view that per se rules develop only after considerable judicial experience with an arrangement, see United States v. Topco Associates, Inc., 405 U.S. 596, 607-608 (1972).

[2]As stated by one commentator,

> It should be plain why there is a real danger of the abuse of the per se principle by those predisposed to offer mechanical or dogmatic solutions to legal problems. In every antitrust case there are two routes to a finding of illegality: critically analyzing the competitive effects and possible justifications of the challenged practice; or subsuming it under one of the per se rules. The lat-

A number of courts have avoided applying a per se analysis in borderline cases by narrowing the scope of the per se category so as not to include the challenged conduct[3] or by deferring per se treatment pending further judicial experience with a novel type of alleged restraint.[4] In *Columbia Broadcasting System, Inc. v. American Society of Composers, Authors and Publishers* (*CBS v. ASCAP*),[5] however, the Second Circuit broke new ground by proposing that a practice which fell within a per se category might nevertheless be justifiable if "absolutely necessary for the market to function at all."[6] As the per se inquiry, by definition, is complete once a determination of inclusion within the per se category is made, this new exception, never before explicitly recognized by a court, strikes at the very core of the per se concept.

One way the per se rule could survive after *ASCAP* is if the market necessity exception were extremely narrow, so that the "Per Se Rule with a Market-Functioning Exception"[7] were qualitatively different from a straight rule of reason analysis. It is clear that the court itself thought it was creating a very narrow exception which would not engulf the per se rule,[8] but it will be shown that the court's "market necessity" analysis is no different from, and perhaps even more lenient than, a traditional rule of reason inquiry. Since, then, the per se rule cannot be saved by the narrowness of the new exception, this comment will propose a method of saving it by carving out a definable area for application of the "market necessity" exception, leaving other areas for application of a straight per se rule without the exception. The "market necessity" exception to the per se rule can be confined to situations where the challenged arrangement is ancillary to, and in furtherance of, a combination of competitors

---

> ter route is naturally the more tempting; it is easier to classify a practice in a forbidden category than to demonstrate from the ground up, as it were, why it is against public policy and should be forbidden.

Elman, *"Petrified Opinions" and Competitive Realities*, 66 COL. L. REV. 625, 627 (1966) *quoted in* Albrecht v. Herald Co., 390 U.S. 145, 170 n. 3 (1968) (Stewart, J., dissenting).

[3]Most courts have thought that the only way of avoiding a per se rule is to somehow distinguish the challenged conduct from the type of conduct previously found to fall within a per se category. The district court's opinion in CBS v. ASCAP, 400 F. Supp. 737 (S.D.N.Y. 1975), is an example of this traditional approach. *Id.* at 748.

[4]*E.g.*, Worthen Bank & Trust v. National BankAmericard, Inc., 485 F.2d 119, 126 (8th Cir. 1973).

[5]562 F. 2d 130 (2d Cir. 1977), *cert. granted* 47 U.S.L.W. 3187 (Oct. 3, 1978) (No. 77-1578).

[6]*Id.* at 136. The market necessity exception to the per se rule was first proposed by the government in an amicus brief on the petition for certiorari of K-91, Inc. v. Gershwin Publishing Corp., 372 F.2d 1 (9th Cir. 1967), *cert. denied*, 389 U.S. 1045 (1968). *K-91* also involved an attack on ASCAP's blanket license, but the attack was by a radio station. See note 25 *infra*.

The "market necessity" exception was discussed by the district court in an earlier ruling on a motion for summary judgment brought by ASCAP on the basis of the *K-91* case. CBS v. ASCAP, 337 F. Supp. 394, 398 (S.D.N.Y. 1972).

In its appellate brief, CBS argued that the "market necessity" exception's validity had been premised on the state of computer technology in 1967, and that in light of recent developments in computer technology it no longer applied. Brief for Plaintiff-Appellant at 27-29, CBS v. ASCAP, 562 F. 2d 130 (2d Cir. 1977).

[7]562 F.2d at 136.

[8]*Id.* at 137, 138 n. 22; and *see* text accompanying notes 26-27 *infra*.

which is able to produce a product, provide a service, or serve a function which no single firm could do.

CBS v. ASCAP: The Treatment of the Issues by the District Court and the Court of Appeals

At issue in *CBS v. ASCAP* was the legality of the "blanket licensing" by ASCAP and BMI[9] of performance rights in copyrighted musical compositions to the CBS television network. Under the terms of the challenged blanket license, users are entitled to perform any and all compositions in the repertories of ASCAP and BMI on an unlimited basis for a negotiated annual fee.[10]

At trial, CBS challenged the blanket license as an illegal tie-in because it forced the user to acquire rights to music it did not need in order to obtain the rights to the music it did need.[11] The trial court dismissed this claim on the basis of its major finding of fact--that CBS would be able to obtain performance rights through direct negotiation with copyright holders.[12] The availability and feasibility of such a direct licensing market signified that CBS was not *compelled* to purchase the blanket license, and in the absence of a finding of compulsion the tie-in claim failed as a matter of law.

CBS argued at trial the price fixing claim of concern here, but only at a late stage in the proceedings. The district court dismissed this claim on the grounds that all the precedents supporting a per se price fixing rule involved some arrangement respecting the price at which each seller would offer his own products, whereas the *CBS* case involved the setting of a price on the entire repertory, leaving each copyright holder free to set

[9]These are the two major performing rights organizations. The American Society of Composers, Authors and Publishers (ASCAP) has a repertory of over three million compositions, while Broadcast Music, Incorporated (BMI) has a repertory of over one million compositions. Their combined repertories include virtually every domestic copyrighted composition. CBS v. ASCAP, 400 F. Supp. 737, 742 (S.D.N.Y. 1975). There is a third licensing organization called SESAC, which is much smaller and privately owned by the Heinecke family. Its repertory includes a large amount of gospel music. S. SHEMEL & M.W. KRASILOVSKY, THIS BUSINESS OF MUSIC 136-38 (1977). In 1975, ASCAP collected over $85 million in performance fees from broadcasters and other sources; BMI collected about $52.5 million; and SESAC collected only about $2.5 million. *Id.* at 162. ASCAP has been operating under the terms of a consent decree stemming from a 1941 antitrust suit brought by the government. BMI has likewise been operating under a consent decree since 1966, while SESAC's operations are not governed by a consent decree. ASCAP and BMI are both required under the terms of their respective consent decrees to offer "per program" licenses to broadcasters in addition to the blanket licenses they have traditionally offered. The consent decrees are discussed in the district court opinion. 400 F. Supp. at 743-45.

[10]In 1969 the ASCAP blanket license cost CBS $5.7 million and the BMI license cost $1.6 million. The fee is determined according to a percentage of advertising revenues. This percentage, which is subject to yearly negotiation, was for many years, in the case of BMI, set at 1.09% of net receipts from sponsors after certain deductions. CBS' combined costs for ASCAP and BMI music run at about $1,000 per program. CBS v. ASCAP, 400 F. Supp. 737,743 (S.D.N.Y. 1975).

[11]*Id.* at 745.

[12]"Copyright holders" are the composers themselves, but usually they will have assigned their licensing rights to their publisher. *Id.* at 761.

his own price on his compositions.[13] The court found support for this distinction in two patent pooling cases which held that the licensing of an entire pool of patents for a fee not reflecting actual use was not per se illegal.[14]

Having determined that the blanket license was not per se illegal, the court was still faced with the task of deciding on the legality of the license under the rule of reason. Here the court was again able to look to the two patent pooling cases for guidance. These cases had held that the bulk licensing of patents was legal so long as there was no overreaching on the part of the licensor and the arrangement was freely agreed to by the licensee.[15] In view of its finding as to lack of compulsion, the court in *CBS v. ASCAP* ruled that the blanket license was "reasonable" under the standard of the two patent pooling cases.[16]

On appeal, the price fixing claim became the major issue in the case. The Second Circuit sustained the lower court on the dismissal of the tie-in claim,[17] but reversed on the dismissal of the price fixing claim.[18] The fact that the blanket license set a price on the collectivity of compositions rather than on any individual composition as in the usual price fixing case did not sway the Second Circuit because, in its view, the governing consideration was that the blanket license "dulled" the incentive of copyright owners to compete.[19] The very availability of a blanket license, the court reasoned, would permit the individual copyright owner to choose it as his medium of licensing in preference to individual bargaining.[20] Another way in which a blanket license overhanging the market might reduce competition is by serving as a reference point for the setting of a price in direct negotiations, because the copyright owner would tend to set his price at a level comparable to what he had been receiving under the blanket license. The court mentioned this second rationale, but did not rely upon it in the absence of proof that copyright owners would in fact behave in such a way in a direct licensing market dominated by a blanket license.[21]

In view of its adverse effect on price competition, the Second Circuit concluded that the blanket license would be per se illegal under the price fixing rule unless the analogy to bulk licensing of patents was controlling

---

[13] *Id.* at 748.

[14] The two cases were Automatic Radio Co., Inc. v. Hazeltine Research, Inc., 339 U.S. 827 (1950) and Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100 (1969). Both involved electronics manufacturing companies which needed patents held by Hazeltine. The latter licensed the use of any and all of its patents in return for a percentage of the licensee's sales.

[15] 395 U.S. at 138; 339 U.S. at 834.

[16] 400 F. Supp. at 749. The court reasoned that CBS was not compelled to take a blanket license because it had the alternative of an ASCAP "per program" license as well as the direct licensing option.

[17] CBS v. ASCAP, 562 F.2d 130, 134-5 (2d Cir. 1977).

[18] *Id.* at 135-40.

[19] *Id.* at 139.

[20] *Id.*

[21] *Id.* at 140, n. 27.

here. The court did not, however, draw the analogy as those cases involved a single seller setting a price on a pool of patents owned by it, whereas *CBS* involved many sellers or licensors agreeing among themselves as to the price at which to license a repertory formed by pooling their individually held copyrights.[22] The fact that CBS was not compelled to take the blanket license did not alter the court's identification of the blanket license as a price fixing mechanism because compulsion is not an element of price fixing.[23]

Characterization of the blanket license as price fixing should have ended the court's inquiry under settled conceptions of a per se rule. Instead, however, the court stated that,

> [I]t may be that in some circumstances market requirements would require the acceptance of some form of price fixing. In fact, both the plaintiff here, CBS, and the Department of Justice, which is charged with enforcing the Sherman Act, recognize in the case of ASCAP blanket licenses what CBS has termed the "Per Se Rule with a Market-Functioning Exception". In short this concept holds that price-fixing is per se illegal except where it is absolutely necessary for the market to function at all.[24]

After discussing the 1967 amicus brief in which the government proposed a "market necessity" exception for the blanket license,[25] the court stated that,

> [t]his "market necessity" concept, as a very limited and narrow exception to the per se rule against price-fixing, is not without merit. It would seem reasonable to conclude that Section 1 of the Sherman Act, which prohibits combinations in restraint of trade, should be construed so as not to prohibit the

---

[22]*Id.* at 138.

[23]The court suggests that the district court considered compulsion an element of price fixing. *Id.* This misrepresents the district court, as it only considered complusion in connection with its rule of reason inquiry *after* finding that the blanket license did not constitute "price fixing." 400 F. Supp. at 748-49.

[24]562 F. 2d at 136.

[25]The case in which the government suggested a market necessity justification for the blanket license was *K-91, supra* note 6. The relevant portion of the government's amicus brief is quoted in CBS v. ASCAP, 562 F.2d at 137.

The *K-91* case involved a radio station's challenge to ASCAP's blanket license. The court sustained the blanket licensing of performance rights in the radio station context, but not on a "market necessity" rationale. The *K-91* court thought that ASCAP's blanket license was "disinfected" by the government consent decree regulating ASCAP's licensing practices. See note 9, *supra.* Additionally, it gave weight to the fact that ASCAP's licensing right was non exclusive and that ASCAP was not the "price fixing authority" since, under the terms of the consent decree, the federal district court for the southern district of New York had the power to set the price on the blanket license in the event the parties were unable to reach agreement on a reasonable price.

In its earlier opinion on ASCAP's motion for summary judgment, the district court distinguished *K-91* on the basis that the radio station had not proposed any alternative means of licensing performance rights, whereas CBS had a specific proposal for a form of "per use" licensing. CBS v. ASCAP, 337 F. Supp. 394, 398 (2d Cir. 1972).

very trade it was intended to protect.[26]

In a footnote, the court then added that, "The narrowness of the exception is emphasized by the circumstance that it is difficult even to imagine another industry where such a "market necessity" defense would be applicable."[27]

It is clear, therefore, that the court thought it was carving out a very narrow exception which would not engulf the per se rule. But the market necessity exception can only be narrow if it involves an analysis qualitatively different from the rule of reason--which it does not--or if there exists some principled way of limiting it to a particular type of case--which there may be. At the outset, the option of limiting the market necessity defense to the music industry or to the performance rights market or, even more narrowly, to the blanket license must be rejected as too unprincipled. Per se rules are not applied industry by industry, but across the board to all conduct within the per se class, without regard to assertions of the reasonableness of the conduct within the context of a certain industry.[28] The court, although perhaps leaning toward such a special exemption for the music industry, did not entirely preclude application of the market necessity defense in other industries, saying only that it would be "difficult even to imagine" another industry where the market necessity defense would apply.[29]

After demonstrating that the court's "market necessity" analysis is no narrower in scope than a traditional rule of reason analysis, this article will attempt to define the type of case in which a rule of reason inquiry such as that undertaken by *CBS* is appropriate. If an area for application of a rule of reason or market necessity analysis can be defined with sufficient specificity, then the per se rule will survive, although in a narrower area than before.

"Market Necessity" as the Rule of Reason in Disguise

In *CBS v. ASCAP*, the Second Circuit held that the blanket license was not absolutely necessary for the functioning of the "market," defined very narrowly as the market in licensing performance rights to the three national television networks. This conclusion was based on the district court's finding that direct licensing by the three networks would be "feasible," in the sense that it would meet a reasonable level of efficiency. This finding was not as difficult to make as it might appear because the networks were already obtaining synchronization rights[30] through direct

---

[26]562 F.2d at 137-38.

[27]*Id.* at 138, n. 22 and *see* text accompanying note 29 *infra.*

[28]If this were not true, a court would have to employ a rule of reason analysis whenever confronted with a restraint which had never before been challenged in the context of a particular industry. This would be so even if the restraint clearly fell within a per se prohibition, such as a direct agreement on prices.

[29]*Id.* at 138, n. 22 and *see* text accompanying note 25 *supra.*

[30]The "television synchronization right" is the right to record copyrighted music on the soundtrack of a filmed or taped program. Such rights are required for programs which are to be rerun. 400 F. Supp. at 759.

negotiation.[31] The direct licensing of these rights did not impose a significant burden on the networks because the job of obtaining these rights was delegated to the independent "packagers" who produce most of the network shows.[32] The packagers themselves were able to obtain the synchronization rights very easily through the services of the Harry Fox Agency, which acted as a broker in these and other rights.[33] There is no apparent reason why the performance right could not be licensed just as easily through precisely the same mechanism. In fact, since the performance right could be obtained as part of the very same transaction through which the "synch" right is obtained, the wasteful duplication resulting from separate negotiation of these two rights would be eliminated. Since this direct method of licensing would be reasonably efficient, while increasing price competition among copyright holders by giving them the power to determine the license fee on their own compositions, direct licensing should be preferred to a system which goes through ASCAP. This is essentially what the court found, but it was not quite prepared to say that the networks could no longer use ASCAP.[34]

The court's holding, however, does not throw as much light on the nature of the market necessity inquiry as does its dictum that the blanket licensing of performance rights to radio stations *would* be an example of "market necessity."[35] Bearing in mind that the court states its test to be whether the price fixing is "absolutely necessary" for the functioning of the market, it becomes apparent that in application the necessity standard is far from absolute and is in fact much closer to a "convenience" or "efficiency" standard. This is so because it can hardly be said that the blanket license is "absolutely" necessary for the licensing of performance rights to radio stations. It may be true that most radio stations do not have independent packagers who put together shows, and therefore could not rely on these packagers to obtain performance rights for them.[36] It is also true that many radio stations do not ordinarily plan their programs in advance and often make their broadcast selections spontaneously, as in response to a telephoned request. However, it is equally clear that radio stations would not stop broadcasting if the blanket license were struck down; they would quickly find other means of securing performance rights.

In a direct negotiation world, they could arrange separately for each

---

[31] *Id.* at 759-60.

[32] *Id.* at 755.

[33] *Id.* at 759-60.

[34] Although the court found that the blanket license constituted price fixing and that it was per se illegal since the market necessity exception did not apply to television network licensing, the court left the door open for the district court to find that there was a "market need" for the blanket license which justified its continued use by the networks. CBS v. ASCAP, 562 F.2d at 140. See text accompanying note 66 *infra.*

[35] 562 F.2d at 140, n.26.

[36] In this respect the radio industry would differ from the television industry. See text accompanying note 32 *supra.*

broadcast of a copyrighted selection, or, more realistically, they could purchase a license for a certain number of broadcasts of the selection and maintain a record of the number of times it was played so as not to surpass the authorized number of broadcasts. Most probably, however, a broker in performance rights would appear in the market.[37] Such a broker could furnish radio stations with a schedule of copyright owners' current "asked" prices. The station could make its selections on the basis of the price schedule, either accepting the indicated price or negotiating directly with the copyright owner for a lower price. Payment would then be made at the end of every month or every year for any music actually used, taking into account the number of broadcasts of a given selection.

Even in an ASCAP license world the blanket license is not at all "necessary." Certain variations on a "per use" license would go far toward narrowing the efficiency differential between this type of license and the blanket license. CBS proposed a per use license where ASCAP would furnish the user with a price schedule on the basis of which the user would make its selections, paying afterwards for the music actually used. The price schedule would be amended periodically to reflect prices copyright holders had requested in the direct negotiation market.[38] In view of these manifold alternatives, some of which could be quite efficient, it becomes apparent that the blanket license is hardly "absolutely necessary" for the functioning of the market in radio performance rights. The "very limited and narrow exception"[39] which the court thought it was creating is really not so narrow at all.

In fact, a court employing a rule of reason analysis, though, might come up with a different result on the matter of the reasonableness of the blanket licensing of performance rights to radio stations. Under the rule of reason, a court would ask whether the blanket license posed a greater restraint on competition than necessary to license performance rights to radio stations. If the court confined its inquiry to the least restrictive ASCAP license, it might rule in favor of some form of per use license

---

[37]400 F. Supp. at 762. The district court found that:

> [T]here is no substantial basis for concluding that the Fox Agency would not expand its services to include television performance rights, just as it has expanded in the past to meet the need of publishers for a central agency for movie performance rights and television "synch" rights. However, even if Fox were unwilling to take on the job of brokering performance rights, the creation of a new agency modeled along the same lines need not be the imposing project CBS makes it out to be.

Id. The above passage reveals a fascinating twist in the case. Because the appeal focused on the price-fixing issue rather than the tie-in issue which had absorbed the parties at the district court level, the parties had to reverse their respective positions on the feasibility of direct negotiation. Thus CBS had argued at trial that direct licensing was *not* feasible in order to support its claim that it was compelled to take the blanket license. Had it known that the case would ultimately be decided on a price-fixing theory, it would have argued just the opposite, as it would have wanted to prove the existence of many alternative ways of licensing performance rights which made the blanket license nonesstential.

[38]400 F. Supp. at 747, n.7.

[39]562 F.2d at 137. See text accompanying note 26 *supra.*

where the copyright holder had some input on the price of his own compositions.[40] Such a per use licensing system would allow price competition among copyright holders since they would be setting their own prices. As it would clearly be more competitive and would also serve the function of licensing performance rights, the per use license should be preferred to the blanket license under the rule of reason.[41]

If the court expanded its inquiry to include direct licensing alternatives, it might make a finding of feasibility similar to that of the district court in *CBS.* Since a direct licensing market such as that already described[42] would be more competitive than an ASCAP-dominated market, while satisfactorily accomplishing the licensing of performance rights, the direct licensing alternative should be preferred to an ASCAP license under the rule of reason.

If the rule of reason could be employed to strike down the blanket licensing of performance rights to radio stations, it follows that an exception to the per se rule which would sustain the blanket license as "absolutely necessary" for the functioning of the market in radio performance rights is hardly a narrow exception. Not only does such an exception engulf the per se rule, it may engulf the rule of reason as well.

The question of whether the blanket license constitutes "price fixing" has yet to be resolved. The district court thought that the blanket license was not price fixing and that it was reasonable.The court of appeals thought that the blanket license *was* price fixing, but then proceeded to apply what amounted to a rule of reason inquiry to find that the blanket license was unreasonable. So, despite differing views over whether or not the blanket license constituted price fixing, both courts analyzed it under the rule of reason, but reached different conclusions. The courts, therefore, may have disagreed on whether to call the blanket license "price fixing," but they were in agreement that the rule of reason should be employed in this case. Given the courts' identical conclusion on the applicability of the rule of reason, it may be unnecessary to inquire whether a "price-fixing" label should have been attached to the blanket license. The question is not so much whether the blanket license was "price fixing" (since the term seems to be used loosely by the Second Circuit), but whether a straight per se rule should be applied. It is true that the blanket license has the effect of reducing price competition among copyright holders, but, as demonstrated below, not every arrangement which affects price competition should fall within the per se price-fixing

[40]See note 36 and accompanying text *supra.*

[41]The question of what weight a court should accord to considerations of efficiency is a delicate one in antitrust law. Some commentators and courts take the view that competition is the only concern of an antitrust court. If this were true, however, it would be difficult to explain why courts have accorded more lenient treatment to "close-knit" combinations such as mergers than to "loose-knit" combinations such as cartels. The obvious explanation is that mergers result in an efficiency-producing integration of productive or distributive facilities whereas cartels do not. See notes 48-49 *infra.*

[42]*See* text accompanying note 36-37 *supra.*

rule.[43] Certain arrangements should be analyzed under the rule of reason if they are ancillary to a joint undertaking which is able to produce a product that none of the parties, acting alone, would have been able to produce.

Limiting the Incursion of the Market Necessity Exception into Per Se Territory

It should now be apparent that the market necessity exception is at least as broad as, if not broader than, the rule of reason. If so, the court has scrapped the per se rule in favor of a rule of reason evaluation of the blanket license. Unless there is a principled rationale for discarding the per se rule in this type of case, the court's assault on the per se rule would appear to be completely unjustified. It will be argued, however, that there *is* such a rationale for applying the rule of reason in *CBS*-type cases, although the factors making *CBS* such a case were not articulated by the court.

Although the following analysis of the proper scope for per se rules is intended to apply to all per se rules, the price-fixing rule will be used by way of example. There are at least five different types of cases where the question of the applicability of the per se rule against price fixing may arise, each of which will now be described in turn.

(1) Agreements or combinations where intent to fix prices is clear. If there is a written agreement, the price-fixing purpose will appear on the face of the agreement, such as in a price-fixing clause. If there is a combination, something may readily reveal the purpose, such as calling a committee the "Tank Car Stabilization Committee."[44] These so-called "direct agreements" on pricing are rarely found nowadays since firms foolhardy enough to attempt to fix prices in spite of the well known per se prohibition of such agreements will employ far subtler techniques.

(2) Agreements or combinations where intent is unclear but where there is an adverse effect on price competition. In such cases, the law will presume price-fixing intent on the theory adopted from tort law that peo-

---

[43]The argument made in this comment is that restraints ancillary to a lawful and useful main purpose should not be subjected to per se scrutiny, but there is a recent case ruling that some arrangements having an effect on price do not fall within the per se rule even though the main purpose was illegal. Thus in Arizona v. Cook Paint & Varnish Co., 391 F. Supp. 962 (D. Ariz. 1975), *aff'd* 541 F.2d 226 (9th Cir. 1976), *cert. denied* 430 U.S. 915 (1977), the court held that a cooperative deceptive advertising campaign engaged in by five manufacturers did not constitute price fixing even though a stimulation of demand and consequent effect on price levels could reasonably have been anticipated from their joint activity.

[44]United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 178, 190 (1940). In this seminal price fixing case, major oil companies embarked upon a plan to "stabilize" the price of gasoline by buying up "distress gasoline" sent to market by independent refiners. This case is widely cited for the proposition that any tampering with the free determination of prices by market forces is price fixing. The holding in that case, however, was facilitated by the fact that the major oil companies had a clear intent to raise the price of gasoline through a buying program devised and coordinated by the "Tank Car Stabilization Committee."

ple are presumed to intend the natural consequences of their actions.[45]

These first two categories constitute the "naked restraints" which serve no apparent purpose but the suppression of competition.[46] There is little doubt that the per se rule should apply in such cases.

(3) Agreements or combinations where the intent is to accomplish some lawful (but not useful) objective and any effect on price competition is only incidental. The application of the per se rule in these cases is somewhat problematic since the parties never intended to fix prices; but, if the restraint serves no economically useful purpose, the per se rule should probably be applied for the sake of preserving competition.[47]

(4) Restraints ancillary to, and in furtherance of, an integration of competitors which results in productive or distributive efficiencies benefiting the consumer. There is disagreement among commentators as to whether such restraints should be permitted if they result in a net reduction of competition. Some commentators view competition as an end in itself under the Sherman Act and therefore believe that any restraints which, on balance, reduce competition should be outlawed regardless of possible efficiencies.[48] Others see competition as but a means to the ultimate end of the Sherman Act--consumer want satisfaction--and accordingly believe that efficiency should always be taken into account by a court.[49]

(5) Restraints ancillary to, and in furtherance of, a joint undertaking among competitors which is able to produce a product or service which

[45]*See, e.g.*, Plymouth Dealers' Ass'n v. United States, 279 F.2d 128 (9th Cir. 1960). In that case the Plymouth Dealers of northern California distributed a price list for use in making pricing decisions. Although customers invariably bargained over the price anyway and there was evidence that the list was prepared and distributed in response to customer complaints about dealer pricing practices, the court found, "[i]t *was* an agreed starting point; it had been agreed upon between competitors; it was in some instances in the record respected and followed; it had to do with, and had its effect upon, price." *Id.* at 132. The dealers' intent was ambiguous, so there is a possibility that they were at least in part motivated by a desire to fix prices, but even if the dealers only intended to benefit customers (a lawful objective), the arrangement would still be prohibited per se under the rationale of category (3) below. *But see Cook Paint*, note 41 *supra*, for the proposition that an arrangement affecting prices raises only a rebuttable presumption of price fixing intent. In that case, the inference of a price-fixing intent was rebutted by clear evidence that the purpose of the arrangement was to advertise (falsely) the properties of polyurethane. *See generally* Van Cise, *The Future of Per Se in Antitrust Law*, 50 VA. L. REV. 1165, 1173 (1964).

[46]United States v. Topco Associates, 405 U.S. 596, 608 (1972) and see note 1 and accompanying text, *supra*.

[47]But see United Statees v. Columbia Pictures Corp., 189 F. Supp. 153 (S.D.N.Y. 1960) (restraint ancillary to a lawful main purpose does not constitute price fixing).

[48]*See, e.g.*, Rahl, *Price Competition and the Price Fixing Rule*, 57 NW. U.L. REV. 137 (1962). *See* note 41 *supra*.

[49]*See, e.g.*, R.H. BORK. THE ANTITRUST PARADOX (1978). Bork believes that the doctrine of ancillary restraints is the best juridical vehicle for his economic views. His thesis is that horizontal market-division or price-fixing agreement should be lawful when:

> (1) the agreement accompanies a contract integration (the coordination of other productive or distributive efforts of the parties);
>
> (2) the agreement is ancillary to the contract integration (capable of increasing the integration's efficiency and no broader than required for that purpose);
>
> (3) the aggregate market share of the parties does not make restriction of output a realistic threat; and

none of the parties, acting alone, could produce.[50] This class of case differs from the preceding category in that there is more than an efficiency justification for the arrangement. At stake is whether a certain product or service is to be produced at all. Even adherents to the competition-as-an-end model of antitrust law might agree that a combination which is necessary to produce a product should be permitted, as well as any incidental restraint which promotes the purpose of the combination.

It is believed that *CBS* fits into this last category of cases and that at least three other cases which also fit into this category have recognized that restraints which would otherwise fall within a per se rule should nevertheless be analyzed under the rule of reason in this type of case. These three cases will now be analyzed in some detail.

In *United States v. Morgan*[51] the government set out to prove that the seventeen investment bank defendants had combined and conspired against the hundreds of other firms in the investment banking industry, through use of the syndicate system as well as other devices.[52] When it became apparent that the government's own evidence was disproving this charge of an overall conspiracy by the seventeen defendants, the government attempted to shift its attack to specific clauses customarily used in syndicate agreements by the entire investment banking industry.[53] Among such clauses is one setting the public offering price of a new issue. Judge Medina ruled that the belated attack by the government on these price-fixing clauses was not properly before the court but that he would, by way of dictum, express his views on the matter.[54] He stated that he did not consider the per se price fixing rule applicable because the case was *sui generis.*[55] Among the special aspects of the case which the judge repeatedly emphasized was that the underwriting syndicates formed by investment banks were necessary to raise the capital required by businesses, for it would be difficult or impossible to find a bank which would be prepared to assume the entire investment risk by itself.[56]

If these underwriting syndicates are able, by spreading the risk, to induce underwriting where it might not otherwise occur, then they serve a useful function and should be protected by the law. Further, and of more importance here, specific agreements made by syndicate members should be lawful if they promote the useful function served by the syndicate

---

(4) the parties have not demonstrated that their primary purpose was the restriction of output.

Bork, *The Rule of Reason and the Per Se Concept; Price Fixing and Market Division* (pt. 2), 75 YALE L.J. 373, 474 (1966).

[50]This concept will be elaborated on later in the article.

[51]118 F. Supp. 621 (S.D.N.Y. 1953) (Medina, J.)

[52]*Id.* at 680.

[53]Syndicate agreements customarily contain clauses relating to the setting of a public offering price, resale price maintenance, withholding of commissions, uniform concessions and reallowances, and stabilization. *Id.* at 682.

[54]*Id.* at 686.

[55]*Id.* at 689.

[56]*Id.* at 639-40.

itself. Thus, an agreement on the issuing price of a new security, though literally within the scope of the price-fixing rule, should be lawful if reasonably tailored to promote the risk-spreading function of the syndicate. Since the knowledge that it will be able to sell its shares at a certain price is a crucial factor in inducing an investment bank to participate in an underwriting, the pricing agreement is a useful and reasonable restraint. Of course, a finding of reasonableness is not ordinarily enough to withdraw a restraint from a per se category; if it were, nothing would be left of the per se rule. But it is here suggested to allow a reasonableness justification in that limited class of cases where the restraint is incidental to a useful joint undertaking which is necessary to serve a particular function, such as risk spreading.[57]

Much the same considerations can be observed at play in *Mackey v. National Football League.*[58] In that case the court held that a per se analysis of the Rozelle Rule[59] was inappropriate even though it fit within the definition of a group boycott, which is normally subject to a per se rule.[60] The court felt that some form of reserve system (if not the Rozelle Rule itself) was probably necessary to maintain a competitive balance among the teams of the League.[61] Again, the fact that some form of restraint might be reasonable should not, in all types of cases, justify abandonment of the per se rule. But there are certain characteristics of the *NFL* case which identify it as the type of case in which the rule of reason should apply. Through cooperative action, represented by the formation of a league, the teams are able to furnish the spectator with a product (good sports competition) which the teams acting independently

[57]Judge Medina also thought that investment banks were distinguishable from the middlemen with which the courts were concerned in price fixing cases. The investment bank does not buy and sell a product, for the item "sold"--the stock certificate--is merely tangible evidence of an underlying investment or loan relationship existing between the investor and the issuer. Furthermore, the function of the investment bank is not merely to buy and sell as a trader or wholesaler but to furnish integrated banking services to the issuer who is seeking expert assistance in raising capital by security issue flotation. *Id.* at 690.

ASCAP could also escape per se treatment under this "different type of middleman" rationale, for it offers users a product (the blanket license) different from what individual copyright holders acting independently could offer.

[58]543 F.2d 606 (8th Cir. 1976). Another case, Philadelphia World Hockey Club, Inc. v. Philadelphia Hockey Club, Inc., 351 F. Supp. 462 (E.D. Pa. 1972), treats the reserve system in the hockey context in much the same way.

[59]The "Rozelle Rule" is an outgrowth of the NFL's "reserve system," under which every player who signs a contract with an NFL club is bound to play for that club, and no other, for the term of the contract plus one additional year at the option of the club. At the end of the option year, the player becomes a "free agent." The Rozelle Rule, specifically at issue in *NFL*, provides that:

> [Whenever a free agent signs] a contract with a different club in the League, then, unless mutually satisfactory arrangements have been concluded between the two League clubs, the Commissioner may...award to the former club one or more players...of the acquiring club as the Commissioner in his sole discretion deems fair and equitable....

543 F.2d at 611.

[60]*Id.* at 618-19.

[61]*Id.* at 621-22.

would be unable to furnish to the same extent. The Rozelle Rule promotes the League's goal of providing the best spectator product by ensuring a fair distribution of talent among the member teams. The *NFL* case serves as a useful reminder that the issue of whether to apply a per se rule does not always decide the fate of the challenged restraint. The *NFL* court, having rejected a per se analysis, found that the Rozelle Rule was more restrictive than the rule of reason, although it believed that some form of reserve system was probably necessary to maintain a competitive balance.

In *Worthen Bank & Trust Co. v. National BankAmericard, Inc.*,[62] the court was confronted with a clause in BankAmericard's by-laws which forbade any card-issuing banks in BankAmericard's national credit card system from becoming card-issuing members of the rival Mastercharge network.[63] The court, focusing more on whether or not this was an appropriate case for per se treatment rather than on whether the clause might literally fall within the "group boycott" label, rejected a per se analysis because the clause was a reasonable measure to preserve the integrity of the BankAmericard system.[64] This case also meets the criteria for a rule of reason analysis of any incidental restraint because, as explicitly recognized by the court, a national credit card system can only exist through cooperative activity on the part of a number of banks, and the clause prohibiting dual membership is apparently designed to preserve the integrity of this useful cooperative endeavor.[65]

Returning to the *ASCAP* case, it can be seen to possess many of the same characteristics as the other three cases. An organization like ASCAP is able to offer the music user a product--the blanket license--which no individual copyright holder could offer. *CBS* differs from the other cases in that the alleged restraint (the blanket license) may be an end in itself, rather than a means to another end. The court, treating the purpose of ASCAP as the licensing of performance rights, analyzed the blanket license as one of several means to that end. Alternatively, however, the blanket license could be treated as an end in itself, in which case its legality would rest upon whether it was a sufficiently distinct product or whether it fulfilled a particular need of the music user. The court did not entirely neglect such an "end" analysis of the blanket license. In its instructions to the district court on factors to consider on remand for determination of an appropriate remedy, the court suggested that the district court investigate the "market need" for a blanket license.[66] If there turned out to be such a need for the blanket license, the court did not think the blanket license should be struck down, even though it was not the least restrictive license under a pure "means" analysis.

[62]485 F.2d 119 (8th Cir. 1973).

[63]*Id.* at 122.

[64]*Id.* at 127. The court also felt that a type of restraint never before challenged in the courts should not receive cursory per se treatment. *See* text accompanying note 4 *supra.*

[65]*Id.* at 127, 128 n.7.

[66]CBS v. ASCAP, 562 F.2d at 140. See note 32 *supra.*

CONCLUSION

The novel "market necessity" exception to the per se price-fixing rule proposed by *CBS v. ASCAP* is not the very narrow exception which the court thought it was creating. In fact, the blanket licensing of performance rights to radio stations, cited by the court as an example of "market necessity," might be struck down under a conventional rule of reason analysis. If this new exception is to stand any chance of survival, then, it must be limited to a particular kind of case. Recognizing that the market necessity exception to the per se rule can alternatively be viewed as a rule of reason analysis, the problem becomes to define those types of cases where a rule of reason inquiry is appropriate despite the literal applicability of a per se rule. This comment has suggested that such a class of cases *can* be identified, and that it comprises those cases where there is joint activity which is able to produce a product which no firm acting alone could produce. Any restraints in such cases, if apparently designed to promote such useful joint activity, should be analyzed under the rule of reason even if they would normally fall within a per se category.